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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-471

DONALD C. McDOUGAL,
Appellant,

v.

COUNTY OF IMPERIAL,
Appellee.

On Appeal From the Supreme Court of California

JURISDICTIONAL STATEMENT

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IN THE

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OCTOBER TERM, 1977

No. _____

DONALD C. McDOUGAL,

Appellant,

v.

COUNTY OF IMPERIAL,

Appellee.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of California handed down on May 25, 1977; rehearing denied and final judgment entered on July 7, 1977. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the Supreme Court of California is reported at 19 Cal.3d 505, 564 P.2d 14, 138 Cal.Rptr. 472. Opinions of the California Supreme Court, the Court of Appeals of California, Fourth District (unreported and now vacated) and the trial court are attached hereto as Apendixes A, B, and C, respectively.

JURISDICTION

This suit was brought by the County of Imperial, to enjoin the operation of Appellant's commercial water well as a violation of the county's zoning. McDougal operated the well pursuant to a use permit granted to his predecessor in interest W. Erle Simpson in 1967. According to the terms of the permit, McDougal was restricted from selling water to anyone who would use it outside the County of Imperial. After trial, the court enjoined the sale of all water by McDougal by means of a commercial trucking operation. The Supreme Court of California partially reversed this injunction, but left standing the restriction on the sale of water for use outside the County of Imperial. The court expressly applied this restriction so as to completely bar sales for use in Mexico, but at the same time authorized unlimited sales in Imperial County. The state court refused to rule on the contentions by McDougal that such a restriction violates the federal constitution. Instead the court under a local principle of estoppel (because McDougal asserts rights under the permit granted his predecessor in interest) declared that McDougal could not raise these constitutional issues. It is McDougal's contention that this affirmation of the validity of the County's restriction is a violation of the foreign and interstate commerce clause and the foreign relations power of the federal government. This decision leaves valid a county statute which is repugnant to the Constitution, treaties and laws of the United States.

The judgment of the California Supreme Court was handed down on May 25, 1977, and final judgment was entered and rehearing was denied on July 7, 1977. Notice of Appeal was filed with the Supreme Court of California on

September 6, 1977. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court of the United States to review the judgment of this case on direct appeal:

1) For the proposition that a Conditional Use Permit is a "state statute" under Title 28, United States Code, Section 1257(2). *Williams v. Bruffy* (1878) 96 U.S. 176, 183.

"Any enactment from whatever source originating, to which a state gives the force of law is a statute of the state within the meaning of the clause cited relating to the jurisdiction of this Court." Also: *Ford v. Surget* (1878) 97 U.S. 594.

2) *King Manufacturing Co. v. City Counsel of Augusta* (1928) 277 U.S. 100 (Municipal ordinance held to be "state statute" where authorized by the state legislature).

Also: *Reinman v. City of Little Rock* (1915) 237 U.S. 171; *Atlantic Court Line Railroad Co. v. City of Goldsboro, North Carolina* (1914) 232 U.S. 548; *Lake Erie and Western Railroad Company v. State Public Utility Comm. of Ill.* (1919) 249 U.S. 422; *Hamilton v. Regents of the University of California* (1934) 293 U.S. 245.

California statutes under which a county is authorized to issue Conditional Use Permits by ordinance:

California Government Code, Section 65850:

"Pursuant to provisions of this chapter, the Legislative body of any county or city by ordinance

may: a) Regulate the use of buildings, structures, and land as between agriculture, industry, business, residence and other purposes. . . ."

California Government Code, Section 65901 (authorizes local body to hear and decide applications for conditional Use Permits when the zoning ordinance provides therefore. County of Imperial Ordinance Numbers 241 and 249 therefore provided).

STATUTES INVOLVED

County of Imperial Zoning Permit under Ordinance No. 241

No. 538-67, dated September 12, 1967.

TO: ERLE SIMPSON
Box 145
Ocotillo, California

In compliance with your request of September 11, 1967, and subject to the terms, conditions, and restrictions written below, permission is hereby granted to:

Sell water extracted from wells located in Lot 11, Tract 776, Yuha Estates, County of Imperial, State of California, subject to the following condition:
1) The water will be sold only for use within the County of Imperial.

This permit shall expire by limitation and become null and void if the building or work authorized herein is not commenced within six (6) months from the date issued and pursued diligently until completion of work.

COUNTY OF IMPERIAL

By: /s/
DAVID E. PIERSON
Director of Public Works

QUESTIONS PRESENTED

1. Can a County in California whose southern border is the international boundary between the United States and Mexico, prevent foreign commerce in products across that border by imposing a home embargo in violation of Article One, Section 8, Clause 3 of the United States Constitution?

2. Can a state or local government discriminate against interstate and foreign commerce and in favor of local commerce in the commodity of captured water which is the personal property of the holder?

3. Assuming that a local government could have originally denied a permit for the commercial sale of water on certain realty; could the local body validly impose a condition on that permit which is repugnant to the United States Constitution (Commerce Clause)?

4. Does acceptance and use of a permit issued by a local government to sell water on certain realty impose upon the permitee, or his successor in interest, an obligation to respect or comply with a condition attached to that permit which is repugnant to the United States Constitution (Commerce Clause)?

5. Where the highest court of the state has determined that a restriction imposed upon a use permit was not placed there by the local government for land use control, but wholy for the purpose of preventing the export of captured water from the county; can the holder of that permit be prevented by state court decree from engaging in interstate or foreign commerce in that captured water, while he is wholly free to engage in local commerce in that product?

STATEMENT OF THE CASE

The case involves land in a county of California which lies along the international border with Mexico. The land in question is some twenty-four (24) miles from the international border crossing at Calexico, California/ Mexicali, Mexico.

Prior to the litigation in question Appellant (hereinafter referred to as McDougal) engaged in a lively private foreign commerce with private persons and entities in Mexico. Captured water was drawn from wells on the premises and stored in holding tanks. This captured water was then sold to Mexican purchasers who received the water at the premises in Imperial County in their tank trucks. The Mexican national purchasers then immediately drove the tank trucks across the international border and unloaded said water at private bottling plants in Mexico.

Appellant operated under a Use Permit issued by Appellee (hereinafter the County) in 1967, allowing commercial sale of water upon the premises. The rights under said permit had wholly vested in Appellant's predecessor in interest, W. Earle Simpson, and Appellant has succeeded to said interest as a vested property right which ran with the land.

The County has secured injunctive relief wholly barring said foreign commerce since December 29, 1972, based upon its assertion that said foreign commerce violates a condition attached to said Use Permit. Said condition provided "water will be sold only for use within the Imperial County."

Since the southern border of Imperial County is a portion of the southern border of the United States, any sales out of the southern border of the County are necessarily in foreign commerce.

The trial court preliminarily enjoined any sale of water by McDougal which would be used in Mexico. After trial, the trial court extended this injunction to bar all sales of water by McDougal by means of a commercial trucking operation. These holdings of the trial court were based on a finding that the commercial well was operated in violation of the County zoning laws. This ruling was subsequently reversed by the California Supreme Court.

In the pleadings, at trial, and on appeal, Appellant has continually asserted the unconstitutionality of the condition. For the actual page citations in the record, please see Appendix "D".

On appeal of the trial court's decision, the Court of Appeal of California, Fourth District (in a now *vacated* decision) found that the restriction in the permit limiting sales of water to those who would use it in Imperial County was unconstitutional as a violation of the Commerce Clause. However, noting that the trial court has found that the restriction was designed to prevent intensive land use, the intermediate appellate court found that it could not uphold the permit without the condition and thus McDougal was left without any type of permit and could sell no water at all.

The California Supreme Court found as a matter of fact and law that there was no valid land use purpose behind the condition. The California Supreme Court further concluded that regardless of the invalidity of the condition under the

Commerce Clause, McDougal could not challenge the condition. Appellant McDougal it was held, is estopped to challenge this condition because Simpson, his predecessor in interest, waived his right to sell to Mexico when he accepted the permit, and failed to challenge the condition.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

THE CONDITION IN THE PERMIT IS UNCONSTITUTIONAL AS A PROHIBITION ON FOREIGN COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE.

There is no question that the condition in this use permit discriminates against and totally prohibits interstate and foreign commerce, while permitting it without restriction in local commerce. As a practical matter McDougal can no longer sell water to Mexican water bottlers.

The Supreme Court of California concluded that the *only* purpose of the County in imposing the condition was to prevent water exportation. There was no land use purpose behind the permit restriction. In other words, this is a naked prohibition on interstate and foreign commerce. This holding by the highest court of the state on the purpose of the County in imposing the condition should not be reviewed by this Court on appeal. *Frost and Frost Trucking Company v. Railroad Commission* (1926) 271 U.S. 583, 592. Also see: *Portland Ry. Co. v. Oregon Ry. Commission* (1913) 229 U.S. 397; *Northern Pacific Railway v. North Dakota* (1915) 236 U.S. 585, 593; *Illinois v. Economy Power Co.* (1914) 234 U.S. at p. 523.

This type of local discriminatory prohibition on interstate and foreign commerce is per se invalid.

City of Altus, Oklahoma et al. v. Carr (1966) 255 F.Supp. 828 (affirmed by the U. S. Supreme Court per curia at 385 U.S. 35).

In this case, the Federal District Court found a ground water exportation prohibition unconstitutional on facts almost identical to the facts of the case at bar. The City of Altus is in Oklahoma, and at that time it had a need to import captured ground water from Texas, much as Mexicali, Mexico has a need to import potable water from McDougal's well in California. The State of Texas enacted a law prohibiting the drawing of captured ground water for use outside of the State of Texas. The District Court struck down this statute as a violation of the Commerce Clause.

> "Considering the statute in question only with regard to whether it regulates the transportation and use of water after it has been withdrawn from a well and becomes personal property, such statute constitutes an unreasonable burden upon and interference with interstate commerce." Page 839.

See also *West v. Kansas Natural Gas Company* (1911) 221 U.S. 229; *Missouri v. Kansas Gas Company* (1924) 265 U.S. 258.

H. P. Hood and Sons v. Du Mond (1949) 336 U.S. 525; the *Hood* case clearly points out the importance of this litigation to the economy of the United States. The consequences of allowing such a "home embargo" would be disastrous.

> "We need only to consider the consequences if each of the few states that produce copper, lead, high grade iron ore, timber, cotton, oil or gas should decree that industries located in that state shall have priority . . . or suppose that the field of discrimination and retaliation be industry. May Michigan provide that automobiles cannot be taken out of the state until local dealer's demands are fully met?"

McDougal does not contend that every *incidental* restraint on foreign and interstate commerce is per se invalid under the Commerce Clause. Where there is a legitimate state police objective, the courts have recognized that a reasonableness standard must be applied, for there are few laws which do not affect interstate commerce in some way. *Southern Pacific Railway v. Arizona* (1945) 325 U.S. 761.

However, where as here, the purpose and effect of the regulation is to directly prohibit and discriminate against foreign and interstate commerce, such restraints have been held *per se* unreasonable, and therefore invalid.

Furst v. Brewster (1931) 282 U.S. 493, 498

> ". . . any state statute which obstructs or lays a direct burden on the exercise of the privilege of engaging in interstate commerce is void under the Commerce Clause. [Cites cases]" Page 498.

City of Altus v. Oklahoma, supra, 255 F.Supp. 828, 837.

> "A state may not enact a law which imposes a direct burden on interstate commerce." Page 837.

A complete prohibition of interstate commerce in captured ground water once it becomes personal property is a direct burden on interstate and foreign commerce.

See *City of Altus, supra,* page 840.

> ***Minnesota Rate Cases*** **(1913) 230 U.S. 251, 396.**
>
> **"If the state enactment imposes a *direct burden* upon the interstate commerce, it must fall regardless of federal legislation." Page 396.**

Incidentally, although the Commerce Clause itself would be enough to preempt this kind of state action, even if the Congress were totally silent, Congress in this case has passed a statute which *specifically* preempts state regulation of exports to foreign countries. (Export Administration Act 50 U.S.C. 2401 et seq., especially §2401(3) which found that unwarranted restrictions on exports by the states can adversely affect the foreign policy of the United States.) Mexico has been specifically designated a "beneficiary developing Country" pursuant to 19 U.S.C. 2462, Ex.Or. No. 11888. Also applicable are 19 U.S.C. 2102 and 2112.

Huron Cement Co. v. Detroit **(1960) 362 U.S. 440, 444; this case has been frequently cited for the proposition that *direct burdens* on interstate commerce consist of burdens which "materially affect interstate commerce in an area where uniformity of regulation is necessary." Page 444.**

It is not hard to see the need for uniformity in the regulation of the export of water. If every county placed such restrictions on its permits to sell water, interstate and foreign commerce in that commodity would come to a complete halt.

A more direct burden on interstate and foreign commerce could not be imagined.

II

THE CONDITION INTERFERES WITH THE INHERENT NATIONAL SOVEREIGNTY OF THE UNITED STATES AND ITS CONSTITUTIONAL AUTHORITY IN THE AREA OF FOREIGN AFFAIRS.

In addition to the burden on foreign commerce this restriction presents a conflict with the foreign relations powers of the United States.

Naturally, no state or county can structure its own foreign policy towards a foreign state such as Mexico. In addition, local political subdivisions may not take actions which might effect the ability of the United States to conduct foreign affairs, even if some valid local purpose might be present.

> *United States v. Pink* (1942) 315 U.S. 203, 232.
>
> "If state action could defeat or alter our foreign policy, serious consequences might ensue. The nation as a whole would be held to answer if a state created difficulties with a foreign power . . . No state can rewrite our foreign policy to conform to its own domestic policies."

The California courts, in voiding the California "Buy American Act" (citing 38 Commercial Treaties and 31 Tax Treaties and numerous other treaties and agreements governing United States commercial relations with the rest

of the world) found that foreign commerce is now inextricably bound up with the national interest and is a part of foreign policy of the United States. *Bethlehem Steel Corp. v. Board of Comm. Dept. of Water and Power Comm.* (1969) 276 Cal.App.2d 221, 80 Cal.Rptr. 800; (hearing denied by the California Supreme Court). Also: *Zschernig v. Miller* (1968) 389 U.S. 429; *U.S. v. Belmont* (1937) 301 U.S. 324, 332.

Whether intentionally or not, the water exportation control exerted by the County in this case does interfere with the foreign relations power of the United States which is inherent in our national government. Water is a vital commodity in Mexico, and to ban its exportation to that country may well embarrass United States foreign policy towards the Mexican Government.

III

DISCRIMINATION AGAINST INTERSTATE AND FOREIGN COMMERCE AND IN FAVOR OF LOCAL COMMERCE IS INVALID AS VIOLATIVE OF THE COMMERCE CLAUSE.

This condition *discriminates* totally against foreign and interstate commerce in favor of local commerce. Such discrimination has been held *per se* unreasonable as a violation of the Commerce Clause. *West v. Kansas Natural Gas* (1911) 221 U.S. 229; *Pennsylvania v. State of West Virginia* (1923) 262 U.S. 543; *Foster-Fountain Packing Company v. Haydel* (1928) 278 U.S. 1; *Toomer v. Witsell* (1948) 334 U.S. 385; *H. P. Hood and Sons v. Du Mond* (1949) 336 U.S. 525. Also: *Edwards v. California* (1941) 314 U.S. 160.

Even if this condition were supposed to have a valid land use purpose behind it, it would still fail as an unreasonable burden on interstate and foreign commerce.

Pike v. Bruce Church (1970) 397 U.S. 137

> "If a legitimate local purpose is found then the question becomes one of degree, and the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on *whether it could be promoted as well with a lesser impact on interstate activities.*" p. 142 (emphasis added)

In this case, traditional land use restrictions could have accomplished any valid land use goal with no burden on foreign or interstate commerce whatsoever.

IV

CAN A STATE (OR A LOCAL POLITICAL SUBDIVISION THEREOF) EXACT A WAIVER OF CERTAIN BASIC PROVISIONS IN THE UNITED STATES CONSTITUTION (SUCH AS THE COMMERCE CLAUSE, THE RIGHT TO RESORT TO THE FEDERAL COURTS) BY IMPOSING THE WAIVER AS A CONDITION ON A GRANT OF RIGHT?

McDougal asserts that a doctrine has been developed under Federal Constitutional Law which prevents states or local governments from setting aside the provisions of the U.S. Commerce Clause or wholly thwarting it by attaching waivers in the form of conditions to their permits, licenses or grants of rights.

> "There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. Engaging in interstate commerce is one. . . ." *Garrity v. New Jersey* (1967) 385 U.S. 493, 500.

A state may not accomplish indirectly what it cannot do directly. This Court has rejected such attempts in the past in the foreign corporations field. In those cases, states were attempting to attach unconstitutional conditions to the privilege of doing business in the state. *W. W. Cargill Co. v. Minnesota* (1901) 180 U.S. 452; *Western Union Telegraph Company v. Kansas* (1910) 216 U.S. 1; *Pullman v. Kansas* (1910) 216 U.S. 56, 63; *Terral v. Burke Construction Co. v. Railroad Commission of California* (1922) 257 U.S. 583, 594-599. Also: *Danskin v. San Diego Unified School District* (1946) 28 Cal.2d 556.

To the extent that the California Supreme Court placed emphasis on the fact that the County was not under any obligation *originally* to give this use permit, the decision below is in conflict with the doctrine of unconstitutional conditions set out in the decisions of this Court.

The California Supreme Court found that McDougal could not challenge the constitutionality of the condition attached to the permit because his predecessor in interest accepted the benefits afforded by the permit without challenge.

None of the cases cited by the Supreme Court of California foreclosed a Federal Constitutional challenge to such a condition.

Whether McDougal can challenge the condition on federal constitutional grounds is a Federal question and cannot be

decided by state law principles, *but must* be decided on Federal Constitutional principles. *Garrity v. New Jersey* (1967) 385 U.S. 493; *Union Pacific Railroad v. Public Service Commission* (1918) 248 U.S. 67, 69-70; *Creswill v. Knights of Pythias* (1912) 225 U.S. 246.

If each state is allowed to decide upon its own principles of estoppel whether a federal constitutional issue may be raised, review by the United States Supreme Court will soon come to rest entirely at the discretion of state courts. The United States Supreme Court should not relinquish its long established power to review state court decisions on whether a party is estopped to assert federal Constitutional objections, using federal Constitutional standards.

V

UNDER FEDERAL LAW, McDOUGAL IS NOT ESTOPPED TO ASSERT THE UNCONSTITUTIONALITY OF THE CONDITION.

W. W. Cargill Co. v. Minnesota (1901) 180 U.S. 452, 468

> ". . . Acceptance of a license, in whatever form, will not impose upon the licensee an obligation to respect or comply with any provisions of the statute or with any regulations prescribed by the [state] . . . that are repugnant to the Constitution of the United States. A license will give the defendant full authority to carry on its business in accordance with the valid laws of the state and the valid rules and regulations prescribed. . . ." P. 468.

If the permittee has met all of the *valid* conditions required for his permit, he will be allowed to continue his operations free of any invalid restriction.

Bowen v. City of Atlanta (1924) 159 Georgia 145, 125 Southeast 199; the defendant, the City of Atlanta, had enacted an ordinance of that City discriminating against black persons and in favor of white persons by preventing the construction of any housing in a particular area of the City of Atlanta to be used by persons other than for those of the white race. The Plaintiff sought a permit to construct dwelling places in the banned area, set apart only for the purpose of white persons and stated in his application that he meant to build houses for the use of black people. The application for a permit was summarily denied. Plaintiff thereupon abandoned the same and made a new application stating that it was for the purpose of persons of the white race in residence therein. That permit was forthwith granted and the Plaintiff thereupon built under the permit and advertised the same for use by black persons, directly in violation of the ordinances of teh City of Atlanta. The defendant threatened the prosecution of Plaintiff and Plaintiff sought an injunction against that threat of prosecution, which was denied by the trial court. The same was forthwith reversed by the Supreme Court of the State of Georgia upon the sole and only ground that the ordinance of the City of Atlanta was unconstitutional under the Fourteenth Amendment of the United States Constitution. Here, clearly, plaintiff had sought and received a permit from the governing body but that permit was conditioned upon a provision which was wholly repugnant to the United States Constitution. The same was forthwith stricken in

favor of Plaintiff, despite the fact that Plaintiff clearly took the permit intending to violate an unconstitutional condition.

Surmeli v. State of New York (1976) 412 F.Supp. 394. In this case a doctor accepted a license to practice on the condition that he become a citizen in ten years. The state claimed that his acceptance of the benefits of his license estopped him from challenging the condition as unconstitutional. The district court found that he was not estopped, holding that the doctrine of estoppel was a "slender reed" for defendants to rely on in foreclosing plaintiff's constitutional attack. Also: *Ashwander v. Tennesee Valley Authority* (1936) 297 U.S. 288.

A long line of cases in the foreign corporations area hold that despite the fact that the corporation has accepted the benefits of doing business in a state, the corporation is not estopped from challenging a condition on this permission which burdens interstate commerce, or some other constitutional right.

Western Union Telegraph Co. v. Kansas (1910) 216 U.S. 1; *Pullman v. Kansas* (1910) 216 U.S. 56, 63

> ". . . the state could no more exact such a waiver [of its constitutional exemption from taxation on interstate commerce] than it could prescribe as a condition of the company's right to do local business in Kansas that it agreed to waive the constitutional guarantee of equal protection of the laws, or the guaranty against being deprived of its property otherwise than by due process of law." p. 63

Also: *International Textbook Co. v. Pigg* (1910) 217 U.S. 91

Terral v. Burke Construction Co. (1922) 257 U.S. 529. In this case the corporation was licensed to do business in Arkansas on condition that it not remove any cases to the federal court. The company accepted the benefits of this license and later successfully challenged the condition.

> "The principle established by the more recent decisions of this court is that a state may not, in imposing conditions upon the privilege of a foreign corporation doing business in the state, exact from it a waiver of the exercise of its constitutional right to resort to the federal courts, or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (emphasis added) P. 532.

Frost and Frost Trucking Company v. Railroad Commission of California (1926) 271 U.S. 583, 594-599.

This case follows the long history of the states' attempts to place unconstitutional burdens on interstate commerce via conditions attached to the states' permission to do business there. Also: *International Paper v. Massachusetts* (1918) 246 U.S. 135, 142-143; *Public Utility Commission v. Ynchaustinco* (1920) 251 U.S. 401, 405 (holding such an estoppel "obviously erroneous."); *Union Pacific Railroad v. Public Service Commission of Missouri, supra,* (1918) 248 U.S. 67, 69-70.

The importance of this question of estoppel extends far beyond the facts of this case. If the judgment of the Supreme Court of California stands, it will open the way for local

governing agencies to place direct restrictions on interstate and foreign commerce, or any other of the well-protected federal constitutional rights, in any grant of right that it may issue. If the original owner gives in to the condition, for whatever reason, the restriction can continue free of any constitutional challenge as against any successor in interest until the end of time.

As an example, consider the following circumstances which are not an unlikely consequence of the State Supreme Court's decision in this case.

Suppose a developer is given permission to build houses in a certain subdivision on condition that no trucks operating in interstate or foreign commerce be allowed to service the houses and stores therein. The developer accepts the condition in order to build quickly without years of delays in the courts.

Under the decision of the Supreme Court of California, neither the home owners nor the store owners could challenge this condition at any time. One could foresee hundreds of such communities, completely closed to interstate and foreign commerce, making a mockery of the Commerce Clause. Also: *Shelly v. Kraemer* (1947) 334 U.S. 1.

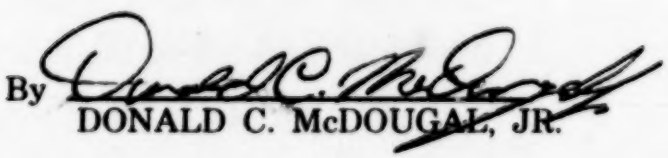
CONCLUSION

In conclusion, the case at bar contains substantial federal questions which deserve full briefing and oral argument before this Court.

In the absence of review by this Court, the decision of the State Supreme Court of California will stand, which will give an open invitation to all of the local land use governing bodies in the state to thwart the U. S. Constitution because of whatever parochial attitudes or prejudices they may have, and the courts using the "Doctrine of Estoppel" will enforce these unconstitutional conditions.

Respectfully submitted,

DONALD C. McDOUGAL, JR.
ALEX A. HARPER

By 
DONALD C. McDOUGAL, JR.

APPENDICES

APPENDIX "A"

COPY

SUPREME COURT
FILED
MAY 25, 1977
G. E. BISHEL, Clerk

A-1

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF IMPERIAL, Plaintiff and Respondent, v. DONALD C. McDOUGAL, Defendant and Appellant.	L.A. 30681 (Super. Ct. No. 43353)

In 1967, Imperial County (county) issued to W. Erle Simpson a use permit to allow commercial sales of water from a well on Simpson's property, which was located in a residential subdivision. The permit contained a limitation that water would be sold for use only within the county. Simpson did not challenge the condition, and he sold only small quantities of water from the well for local use. In 1970, the tract in which Simpson's property was located was zoned for low intensity use, but the zoning allowed the development of natural resources for commercial purposes upon the issuance of a conditional use permit.

Simpson sold the property to defendant Donald C. McDougal in 1972. McDougal, without obtaining a new permit pursuant to the 1970 enactment, proceeded to substantially increase the volume of sales of water from the well, and numerous trucks entered the property for the purpose of transporting the water. He failed to comply with the limitation in the Simpson permit against the sale of water for use outside the county, and much of the water from the well was sold for distribution in Mexico.

The county sought injunctive and declaratory relief, alleging that McDougal was violating the 1970 zoning law by selling water for export and by employing tank trucks to carry large amounts of water from the well, without a conditional use permit. The trial court found in the county's favor and enjoined McDougal from "conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972."[1/]

On this appeal from the ensuing judgment, McDougal claims that he is not required to secure a permit pursuant to the 1970 zoning ordinance because under the permit issued to Simpson he has a vested right to increase the volume of sales from the well and to employ tank trucks for hauling the water away, and that the limitation in the permit against sales of water for use outside the county is invalid.

The subdivision in which Simpson's land was located consisted of 16 10-acre parcels which were governed by deed restrictions providing that the lots were to be used for residential purposes. Although the tract had not been comprehensively zoned in 1967 when Simpson applied for his

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1/ A second cause of action alleged that the manner in which McDougal operated his business constituted a public nuisance, and a third asserted that McDougal was violating the county's Groundwater Appropriations Ordinance. The third cause of action was by stipulation of the parties ordered to be separated from the first and second, and to be tried only upon good cause being shown on motion of either party. No trial of this count was held. The trial court made no findings on the second cause of action alleging a nuisance, determining that such findings were unnecessary because of its conclusion that McDougal was violating the county's zoning laws.

permit, an interim zoning ordinance required a permit for any land uses other than those specifically exempted therein, and county officials notified Simpson that he was required to obtain a permit in order to conduct a commercial water sale business.

Public hearings were held on Simpson's application, initially before the planning commission, and subsequently before a joint meeting of the commission and the board of supervisors. At the commission meeting, two other landowners in the tract argued against the granting of the permit on the ground that it would interfere with the quiet enjoyment of their property, and the county's chief planning officer recommended against granting the permit for the same reason.

Between 1968 and 1972, only a few tank trucks were loaded with water from the well, and Simpson sold a total of approximately 500,000 gallons of water in those years. When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July 1972 as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well day and night.

The neighboring landowners protested the noise and fumes generated by the traffic, and county officials,

contending that McDougal was required to secure a conditional use permit under the 1970 ordinance, demanded that he discontinue his operation. Thereafter, McDougal applied for a permit, but with insistence that his application was without prejudice to any subsequent claim that no permit was required. The permit was denied, and he unsuccessfully appealed the denial to the board of supervisors.

In October 1972, the county brought this action to restrain McDougal from selling water from the well or from allowing tank trucks to enter his property for the purpose of carrying water away, and it also sought a declaration that McDougal was violating the 1970 zoning ordinance.

The trial court found that McDougal's business "as conducted on the premises commencing on or about June 30, 1972" was in violation of the zoning ordinance because he had failed to secure a conditional use permit. It found further that the Simpson permit did not entitle McDougal "to conduct his type of operation" and that the restriction contained in that permit was designed to prevent the intensive commercial operation undertaken by McDougal because it would be incompatible with the surrounding residential land uses. Finally, the court determined that McDougal's business constituted an illegal "formidable expansion" of the usage contemplated under the Simpson permit, and that any effect on international commerce due to the restriction was merely incidental to a valid exercise of the police power designed to regulate local land use.

The court's judgment declaring that McDougal was in violation of the 1970 ordinance and enjoining him from "conducting a trucking operation on the premises similar to

that which occurred commencing on June 30, 1972" appears to relate both to the sale of water for export outside the county and to the use of substantial numbers of trucks to carry the water from the property. We conclude that the judgment must be upheld in its first aspect but that there was insufficient evidence to justify the prohibition against the manner in which the business was operated.

McDougal's fundamental assertion is that he was not required to obtain the conditional use permit required by the 1970 zoning ordinance because he had a vested right, pursuant to the Simpson permit, to sell water from the well, and that he was not compelled to comply with the geographic restriction in the permit because it is invalid.

Initially, we observe that a conditional use permit, unlike a nonconforming use, allows a use permitted rather than proscribed by the zoning regulations but because of the possibility that the permitted use could be incompatible in some respects with the applicable zoning, a special permit is required.[2]/ (3 Anderson, American Law of Zoning (2d ed. 1977) p. 359.) Such permits run with the land (Cohn v. County Board of Supervisors (1955) 135 Cal.App.2d 180, 184), and McDougal succeeded to any benefits which Simpson enjoyed under the permit issued to him. Thus, if Simpson would have been allowed to carry on his business in the manner McDougal employed after June 1972, then McDougal was operating within the permit and was not required to secure a permit under the 1970 ordinance.

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[2]/ Section 83421 of the county's ordinances authorized the issuance of a conditional use permit if "such uses as deemed essential or desirable to the public convenience or welfare, and are in harmony with the various elements or objectives of the comprehensive general plan."

It is equally clear, however, that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed. Simpson, by failing to challenge the limitations imposed upon him by the permit, waived his right to object to the condition prohibiting the sale of water for use outside the county. At the joint meeting between the planning commission and the board of supervisors during which issuance of the permit was discussed, he was represented by counsel, and at that hearing voluntarily withdrew from his application a request to export water to Mexico. The deputy county counsel had stated as his opinion that the proposed limitation on the export of water was valid. Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith.

A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. (Edmonds v. County of Los Angeles (1953) 40 Cal.2d 642, 650; Zweifel Manufacturing Corp. v. City of Peoria (Ill. 1957) 144 N.E.2d 593, 595; Psyhogios v. Village of Skokie (Ill.App. 1972) 280 N.E.2d 552, 556; Skipjack Cove Marina, Inc. v. County Commissioners (Md. 1969) 250 A.2d 260, 265-267; Stevenson v. Palmer (Tenn. 1969) 448 S.W.2d 67, 69; cf. Naper Aero Club v. County of Du Page (Ill. 1964) 197 N.E.2d 1.) Thus, McDougal is estopped to assert that the prohibition in the Simpson permit against the

sale of water for use outside the county is invalid, and he is bound by the limitation.[3]/

We come, then, to the second aspect of the trial court's determination, i.e., that the conditional use permit issued to Simpson did not authorize McDougal to conduct his water sale business as an intensive commercial operation, with numerous trucks entering and leaving the premises night and day. As we have seen, the permit contained no express limitation in this regard. The trial court's determination was based upon its conclusion that the purpose of the restriction against the sale of water for export was to prevent intensive commercial exploitation of the well on Simpson's property in a manner incompatible with the surrounding residential area. McDougal claims that the evidence was insufficient to support this determination, and we agree.

The record establishes that in July 1967 two neighbors opposed Simpson's application for a permit before the planning commission on the ground that commercial use of

---

[3]/

In view of this conclusion, we need not decide whether the prohibition against the export of water was valid. (See City of Altus, Oklahoma v. Carr (W.D.Tex. 1966) 255 F.Supp. 828.) Shelley v. Kraemer (1947) 334 U.S. 1, relied upon by McDougal, is inapposite. In that case, it was held that the enforcement by a state court of a racially restrictive covenant in a real estate contract constituted state action, denying the black purchasers equal protection of the laws. *Shelley* did not involve the waiver of rights or the challenge to the validity of a condition relating to the economic value of a permit whose benefits the permittee sought and accepted. Nor can Simpson's right to export water from the county be analogized to the constitutional rights which the petitioners in *Shelley* sought to vindicate.

the property would violate their right of quiet enjoyment, and the county's chief planning officer recommended against granting the permit for the same reason. He testified that the commission was concerned both about the export of water and "intensification of usage of the land" in considering Simpson's application, but did not refer to any specific evidence in this regard. The planning commission determined to hold the matter over for a joint meeting with the board of supervisors in order to allow time for the two bodies to formulate a water exportation policy for the county. That hearing was held in September, and members of both bodies expressed concern over the amount of water being exported from the county to Mexico. After Simpson agreed to remove his request to sell water for use in Mexico, the planning commission reconvened and voted to grant the Simpson permit on the condition that water from the well would be sold only for use within the county. No mention was made at the joint meeting of matters relating to the use of Simpson's land, and in the resolution of the planning commission granting the permit reference was made to problems of water export but none to limiting the character of the commercial usage of Simpson's property.[4/]

[4/] McDougal asserts that the trial court erred in finding that there was public opposition to the granting of the Simpson permit because the resolution of the planning commission granting the permit states otherwise. The resolution, dated September 11, 1967, refers to the joint meeting between the board of supervisors and the planning commission and states that "there was no opposition present at *this* meeting." (Emphasis supplied.) Obviously, the resolution refers to the September meeting rather than the July hearing before the planning commission alone. It is clear from the testimony there was opposition to the granting of Simpson's permit at the July hearing.

The evidence relied upon by the county is insufficient to sustain the trial court's finding that the restriction was designed to prevent intensive commercial use of Simpson's property. If the commercial character of the proposed use had been a major concern of the commission it was not without means to control Simpson's business by the imposition of appropriate restrictions. Instead, the commission, after extensive discussion of the water exportation problem, issued the permit conditioned only upon a limitation on the export of water, in a resolution which referred only to that issue. Under these circumstances, we must conclude that the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the county.

Thus, the trial court's judgment must be affirmed insofar as it prohibits McDougal from violating the restriction against the exportation of water from the county, and reversed to the extent that it determines that McDougal violated the 1970 zoning ordinance by allowing large numbers of trucks to haul water from the well and enjoins him from operating his business in this manner.

Our decision does not mean, of course, that the county may not employ means to assure that McDougal does not conduct his business by methods which create a nuisance. As we have seen, the second cause of action in the county's complaint alleged a nuisance, but the trial court found it unnecessary to make findings on this issue because it determined that McDougal's conduct violated the zonig ordinance. Upon remand, the trial court may consider appropriate findings on the county's allegations that McDougal's operation of his business constitutes a nuisance.

One final matter should be noted. The county contended at the trial that McDougal was prohibited from selling water from his well by section 83400 of the county's ordinances, which provides that nonconforming uses of land must be discontinued within one year. The trial court found that "[A]ny nonconforming use right" of McDougal was terminated by this provision. We have concluded that McDougal had a valid conditional use permit for commercial operation of the well, and the operation of his business did not constitute a nonconforming use.

The trial court's judgment is affirmed insofar as it prohibits McDougal from selling water for use outside the county; it is reversed to the extent that it enjoins McDougal from employing large numbers of tank trucks to haul water from his property and determines that such conduct violates the county's 1970 zoning ordinance.

MOSK, J.

WE CONCUR:

TOBRINER, Acting C.J.
CLARK, J.
RICHARSON, J.
*SULLIVAN, J.
**DEVINE, JR.
**BROWN (GEO. A.), J.

*Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

**Assigned by the Chairman of the Judicial Council.

ORDER DUE
July 22, 1977

ORDER DENYING REHEARING

L.A. No. 30681

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

COUNTY OF IMPERIAL

v.

McDOUGAL

SUPREME COURT
FILED
JUL 7 1977
O. E. BISHEL, Clerk

Appellant's petition and application for stay/supersedeas for rehearing/DENIED.

Bird, C.J., is of the opinion that the petition should be granted.

Bird
Chief Justice

COPY

A-12

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COUNTY OF IMPERIAL, Plaintiff and Respondent, v. DONALD C. McDOUGAL, Defendant and Appellant.	L.A. 30681 (Super. Ct. No. 43353) SUPREME COURT FILED JUL 7, 1977 G. E. BISHEL, Clerk

BY THE COURT

On petition for rehearing, McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the Court of Appeal or in this court. (Employers' L.A. Corp. v. Indus. Acc. Com. (1918) 177 Cal. 767, 771; Prince v. Hill (1915) 170 Cal. 192, 195; People ex rel. Dept. of Public Works v. Mascotti (1962) 206 Cal.App.2d 772, 779; Bradley v. Bradley (1949) 94 Cal.App.2d 310, 312.)

The petition for rehearing is denied.

APPENDIX "B"

IN THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

COURT OF APPEAL - FOURTH DIST.
FILED
AUG 5 - 1976
ERVIN J. TUSZYNSKI, Clerk
W. Delton
DEPUTY CLERK

COUNTY OF IMPERIAL,

Plaintiff and Respondent,

v.

DONALD C. McDOUGAL,

Defendant and Appellant.

4 Civ. No. 12964
(Sup. Ct. No. 43353)

APPEAL from a judgment of the Superior Court of Imperial County. Andrew J. Eyman, Judge. Affirmed.

The County of Imperial brought the action to enjoin defendant Donald C. McDougal from selling water from his commercial water well near Ocotillo in Imperial County. The action was based on three causes of action (1) violation of the zoning laws, (2) a public nuisance, and (3) violation of the County's ground water appropriation ordinance. We are concerned here with the elements of the zoning violation only, inasmuch as the trial court based its judgment exclusively on that cause of action. McDougal answered asserting he held a valid conditional use permit for commercial sales of water from the premises. The permit had been obtained by the previous owner of the property and was not revoked. The trial court found that the conditional use permit was valid but contained a restriction that the water could only be used in Imperial County and McDougal was selling water for use outside the County in violation of the

permit. A permanent injunction was granted enjoining McDougal's use of the premises for sale of water on the large scale basis as occurred "commencing on or about June 30, 1972." McDougal appeals.

In 1966 a subdivision of 16 ten-acre lots was created in Imperial County. The lots in this tract, designated Tract 776 (The Yuha Estates), were offered for sale for residential sites. In March 1967 W. Erle Simpson purchased Lot 11 and installed a well, pump, storage tank and an overhead loading spout. Yuha Estates had not been zoned at that time and under Ordinance 241, an interim zoning ordinance then in effect, a permit was required for all uses not specifically exempted. Under that ordinance no permit would be required for "natural resources development" but a commercial use was not so exempt. The County officials assumed this use was commercial and advised Simpson a permit was required. In June 1967 Simpson made his application to the County Planning Commission for the conditional use permit.

Notice of the hearing before the Planning Commission was given and opposition developed from the neighbors who argued the proposed commercial operation would be incompatible with surrounding residential uses. Specific reference was made to another commercial operation eight miles to the north where water was being extracted and neighbors counted as many as 14 trucks lined up at one time at the premises waiting for delivery. By his own admission McDougal acknowledges he delivered up to 250,000 gallons in a single day and used some 44 trucks.

McDougal's 24-hour operation brought protests from the neighbors and the County made demand the operation be

halted. McDougal contends that he had a permit. Under a stipulation between the County and McDougal's attorney that it would not prejudice his right to claim no further permit was required, McDougal agreed to apply to the County Planning Commission for a permit under the new "S" Zone and on July 18, 1972 did so. The County Planning Commission had a full-scale hearing. The neighbors came to protest claiming the noise, dust, fumes, odors and sight of the trucks and water dispensing equipment interfered with reasonable residential uses. The application was denied by the Commission. McDougal appealed to the Board of Supervisors where the issues were presented anew and reargued. The Board affirmed the Planning Commission and denied the permit. McDougal continued his sale of water to Mexican distributors and the County sought an injunction.

The trial court made four significant conclusions, among others:

> 1. "The restriction imposed in the Simpson permit was designed to prevent the very type of intensive commercial operation on the premises conducted by the defendant."
>
> 2. "A chief reason for imposition of the restrictive condition in the 1967 permit, i.e., that water would only be used in the County, was to prevent an intensive land usage on the premises which would be incompatible with surrounding residential land uses and to thus protect the general welfare."
>
> 3. "The condition imposed in Simpson's 1967 permit was not intended to directly burden or interfere with international commerce. Any effect on international commerce, caused by the 1967 permit restriction or the denial of the

> defendant's application, would be merely incidental to a valid exercise of police power designed to regulate local land uses in the interest of general welfare."
>
> 4. "Defendant's operation constituted an illegal 'formidable expansion' of any usage of the premises contemplated under the permit issued to Mr. Simpson in 1967."

McDougal must rely on some conditional use permit for authority to conduct his business of selling water on an expanded basis from these premises and the only one available, if at all, is the one obtained by Simpson. While it is true Simpson might have been able to use the premises to develop the natural resource (water) without a permit, he chose to get one and abide by the condition not to sell outside Imperial County. He made no large scale use of the water developed from the property. Operating under the restricted authorization of the permit he developed no vested right to sell water on a large scale basis or for use outside the County.[1] When the new "S" Zone was created Simpson made no request for a new permit since his use did not exceed that provided under the existing permit and his limited nonconforming use was vested. The "S" Zone requirements were in effect when McDougal acquired the property so he would have no greater rights than Simpson and the vested rights were limited. He would be obliged to have a permit if

FOOTNOTE 1: Vested rights are protected from curtailment only to the extent they relate to uses existing at the time of enactment of the zoning ordinance and not constituting nuisances (*Wheeler v. Gregg*, 90 Cal.App.2d 348, 365).

he intended an expanded use. McDougal makes no issue as to the necessity of his having a permit for this expanded use he intends to make of the property.[2] He asserts, however, a valid permit was acquired from Simpson when the land was purchased.

Special use permits under zoning ordinances run with the land and a variance for the use of property in a particular manner is not personal to the owner at the time of the grant, but is available to any subsequent owner, until it expires according to its terms or is effectively revoked (*Cohn v. County Board of Supervisors*, 135 Cal.App.2d 180, 184). Under the circumstances of this case McDougal would acquire the benefits of Simpson's conditional use permit when he acquired the land.

McDougal contends the condition imposed in the permit, i.e., not to sell water for use outside the County of Imperial, is an unlawful attempt to regulate international commerce violative of article 1, section 8, clause 3, of the United States Constitution which reserves that power to Congress. We agree.

Congress possesses exclusive jurisdiction "to regulate commerce with foreign nations and among the everal states" (U.S. Const., art. 1, §8, cl. 3). Municipal ordinances or state

FOOTNOTE 2: The use McDougal seeks to make is very obviously an expanded one when you compare the 500,000 gallons in four years extracted by Simpson to the 240,000 gallons extracted in a single day by McDougal.

statutes which directly interfere with, or constitute a direct regulation of, interstate commerce or foreign commerce violate the Constitution and are void. The rule applies equally to all levels of local government (5 McQuillin, 3d ed., Municipal Corporations, §19.55, p. 525). In determining whether local legislation violates the commerce clause, a fundamental consideration is whether such legislation unduly burdens or interferes with interstate commerce. Ordinarily, state and local police regulations which only incidentally affect interstate commerce and impose no direct burden on it will be sustained (*Nippert v. City of Richmond*, 327 U.S. 416, 425 [66 S.Ct. 586, 590]). It has been held an unlawful interference with interstate commerce to restrict the place of use of a natural product once it has been lawfully extracted from the underground (see *Commonwealth of Pennsylvania v. State of West Virginia*, 262 U.S. 553, 596-597 [43 S.Ct. 658, 665]; *City of Altus, Oklahoma v. Carr*, 255 F.Supp. 828, 840 [affirmed per curiam, 385 U.S. 35 (87 S.Ct. 240-241)]). The restriction here placed on the conditional use permit is directed to the use of personalty as it may flow in interstate commerce and is not stated in terms of land use. The condition contained in the permit imposes a direct restriction on interstate commerce whatever may have been intended by the Board. A condition which restricts such things as the number of trucks visiting the property daily or the volume of noise or dust would properly control the land use. Regulation of the location of use of water after it leaves the premises does not offer a reasonable protection to the property interests. The restriction must be held void.

We are then faced with the problem of the validity of the conditional use permit absent the restriction. We do not

perceive it to be the law that when a restriction contained in a conditional use permit is found to be invalid the court must nevertheless hold the permit valid in all other respects when there is a clear expression of desire to grant the permit only on that or a relevant condition. By analogy, when a portion of a statute, also a legislative act, is declared invalid the rest of the statute will remain in effect only if it would do no violence to the legislative purpose of the whole (*In re Perez*, 65 Cal. 2d 224, 231-232; *People v. Clay*, 18 Cal. App. 3d 964, 971; 13 Cal. Jr. 3d, 155-159). Here the Board of Supervisors clearly desired to restrict the size of the business operation and thought they could accomplish it using the language of this restriction. The finding by the trial court that the intensive land usage occasioned by development of water sales outside the County was a chief reason for imposition of the restrictive condition makes it apparent the Board had no desire to allow unrestricted use of the property for business purposes. The opposition present when Simpson requested the permit originally provides substantial evidence of this finding. It would be manifestly unfair to the adjacent property owners and in direct contravention of the Board's concern to hold the permit valid while striking the restrictive conditions. Foreign cases cited by McDougal are not helpful in that they refer to conditions which were unrelated to the use of the property which the legislative body sought to control and which it had a legitimate right to control.[3] The

FOOTNOTE 3: See *Naper Aero Club v. County of Du Page*, 30 Ill. 2d 447 [197 N.E.2d 1], permit to operate an airport conditioned on the granting nearby residents use of the facilities invalid because it did not affect the use made of the airport property being zoned; *Oakwood Island Yacht Club v. Board of Appeals*, 223 N.Y.S.2d 907, granted a permit to operate a yacht club conditioned on requirement to connect cottages to sewer, a facility unrelated to the special use applied for.

invalid condition here under consideration was related to land use, though improperly so because of its commerce implication. We are satisfied it would be contrary to the express intent of the Planning Commission and the Board of Supervisors to allow the permit to stand without some restriction on land use and as such we must find the whole permit falls with the inseverable invalid condition.

The Simpson permit being invalid, McDougal is without proper authority to operate the business in this residential setting. While this is not the theory on which the trial court relied, it supports the judgment and may be applied by the reviewing court (*Davey v. Southern Pacific Co.*, 116 Cal. 325, 329-330; 6 Witkin, Cal. Proc., 2d ed., p. 4215 et seq.).

Judgment affirmed.

Colegrove
J.

WE CONCUR:

Ault
Acting P.J.

Craig Colvin
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX "C"

C-1

FILED
IMPERIAL COUNTY, CA.
JUL 11 3 25 PM '73

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF IMPERIAL

COUNTY OF IMPERIAL, Plaintiff, vs DONALD C. McDOUGAL, Defendant.	No. 43352 JUDGMENT

The above cause came on regularly for trial on April 5, 1973, in Department I of the above entitled Court, the Hon. Andrew J. Eyman, Judge, presiding without a jury, and was actually tried on the 5th and 6th of April 1973. Evidence both oral and documentary having been presented by both parties and the cause having been argued and submitted for decision and the Court having made and caused to be filed its Written Findings of Fact and Conclusions of Law;

IT IS ORDERED, DECLARED, AND DECREED:

1. Defendant's use of Lot 11 of the "Yuha Estates" as conducted commencing on or about June 30, 1972, involving large numbers of tank trucks driven onto and off the premises at all hours for transporting water therefrom, was in violation of the County's zoning.

2. Plaintiff shall have judgment permanently enjoining the defendant, his heirs, successors, assigns, agents, servants, and employees, and all persons acting in concert with or for him, from conducting a trucking operation on the premises similar to that which occurred commencing on or about June 30, 1972. Any similar commercial operation on the premises may only be permitted upon the issuance of a conditional use permit or other proper entitlement by the County.

3. Plaintiff shall further be entitled to its cost of suit.

Dated: July 10, 1973

/s/
ANDREW J. EYMAN
Judge of the Superior Court

THE FOREGOING INSTRUMENT IS A CORRECT COPY OF THE ORIGINAL ON FILE IN THIS OFFICE.

ATTEST: JUL 12 1973 19

HARRY M. FREE COUNTY CLERK AND CLERK OF THE SUPERIOR COURT IN AND FOR THE COUNTY OF IMPERIAL, STATE OF CALIFORNIA.

BY DEPUTY

APPENDIX D

CITATIONS TO RECORD OF WHERE FEDERAL CONSTITUTIONAL CLAIMS WERE RAISED IN THE LOWER COURTS.

1) In the answer, first affirmative defense, Clerk's transcript Page 90, Line 7.

2) Reporter's Transcript of December 11, 1972, (asserted provision invalid) Page 76, Line 17-19.

3) Reporter's Transcript of December 11, 1972, Page 98 (*City of Altus* case cited and trial court indicates it has read).

4) Clerk's Transcript Page 302, Defendant's separate pretrial statement asserts that the condition is illegal and unconstitutional and that the permit should continue as valid without the condition.

5) Clerk's Transcript, Page 307, Lines 1-8: (Defendant asserted that the condition was an attempt by a local body to regulate interstate commerce).

6) Clerk's Transcript, Page 316: (Court states issue in the case as whether the condition is valid).

7) Clerk's Transcript, Page 358: (The Defendant McDougal asserts that the condition is designed to prevent exportation of water from Imperial County).

8) Clerk's Transcript Pages 347-366, extensive discussion of the unconstitutionality of the condition.

9) Clerk's Transcript, Page 400, Line 23: McDougal asserts that there has been no waiver of the right to challenge the condition attached to the permit.

10) Clerk's Transcript, page 404: Direct and unreasonable burden on interstate commerce asserted.

The unconstitutionality of the condition was extensively briefed by the Appellant McDougal at the first appellate level in his opening brief at pages 39-44. The point was further argued in Appellant's petition for rehearing in the California Court of Appeals, Fourth District at pages 12-19, with extensive discussion of why the permit should stand where the condition is found invalid. The same arguments were made in the petition for hearing in the California Supreme Court. At page 10 of Appellant's Petition for Rehearing, McDougal asserts that he has a property right which cannot be taken away because the condition is invalid.

In his petition for rehearing before the California Supreme Court, McDougal argued extensively that the State ruled estoppel does not apply to unconstitutional conditions as opposed to merely invalid land use conditions.

Supreme Court, U. S.
FILED
OCT 25 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977
No. 77-471

DONALD C. McDOUGAL,

Appellant,

vs.

COUNTY OF IMPERIAL,

Appellee.

MOTION TO DISMISS.

JAMES H. HARMON,
Courthouse,
El Centro, Calif. 92243,
(714) 352-3610, Ext. 250,
County Counsel, County of Imperial,
Attorney for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

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IN THE

Supreme Court of the United States

October Term, 1977
No. 77-471

DONALD C. McDOUGAL,

Appellant,

vs.

COUNTY OF IMPERIAL,

Appellee.

MOTION TO DISMISS.

Appellant appeals from the judgment of the Supreme Court of California in *County of Imperial v. McDougal*, 19 Cal. 3d 505 (1977). This motion requests that the Supreme Court of the United States refuse to assume jurisdiction of the appeal because (1) the federal question sought to be reviewed was not expressly passed on by the California Supreme Court; and, (2) the judgment of the State Court rests on an adequate non-federal basis.

Statement of the Case.

Appellee hereby incorporates by reference the recital of facts contained in *County of Imperial v. McDougal* (see Appendix "A" of Appellant's Jurisdictional Statement, commencing with A-1). Additionally, Appellee wishes to correct certain statements of "fact" made by Appellant which constitute legal conclusions having no support in the California Supreme Court's opinion.

Appellant states that he ". . . operated under a Use Permit issued by Appellee in 1967, allowing commercial sale of water upon the premises" and he further asserts that "[t]he rights under said permit had wholly vested in the Appellant's predecessor in interest, W. [Erle] Simpson, and Appellant has succeeded to said interest as a vested property right which ran with the land" (Jurisdictional Statement at p. 7). Said statements constitute a mischaracterization of the case as shown by findings of the California Supreme Court.

Following a hearing in 1967, Mr. Simpson was issued a use permit which contained the condition prohibiting

the sale of water for use outside the County (A-6). Mr. Simpson was represented by counsel at the hearing and he [Simpson] "voluntarily withdrew from his application a request to export water to Mexico" (A-6). Thereafter, Simpson accepted the benefits afforded by the permit and conducted himself in accordance therewith (A-6).

The State Supreme Court made the following findings with regard to Appellant:

> "When McDougal purchased the property in 1972, he was aware of the restriction against the sale of water for export from the county and knew that Simpson had not made intensive commercial use of the well. McDougal requested the board of supervisors to remove the export limitation, but he was advised that a conditional use permit would be required to accomplish this result. Without applying for such a permit, he entered into contracts to sell water for distribution in Mexico, and beginning in July, 1972, as many as 44 trucks a day, with a capacity of 250,000 gallons, loaded water at the well, day and night" (A-3).

In characterizing Appellant's status, the State Supreme Court rejected the attempt to assert greater rights than those held by his predecessor and stated "[i]t is equally clear, . . . that McDougal is subject to the limitations in the permit under which he claims, and that he can assert no greater rights therein than Simpson enjoyed" (A-6).

ARGUMENT.

I

The Federal Question Sought to Be Reviewed Was Not Expressly Passed on by the California Supreme Court.

After making the determinations discussed above, the California Supreme Court concluded:

> "A number of cases have held that a landowner or his successor in title is barred from challenging a condition imposed upon the granting of a special permit if he has acquiesced therein by either specifically agreeing to the condition or failing to challenge its validity, and accepted the benefits afforded by the permit. [citations omitted] Thus McDougal is estopped to assert that the prohibition in the Simpson permit against the sale of water for use outside the county is invalid, and he is bound by the limitation" (A-6 - A-7).

As a footnote to its holding, the Court said: "In view of this conclusion, we need *not* decide whether the prohibition against the export of water was valid" [citing authorities] (A-7).

Moreover, the State Supreme Court rejected Appellant's attempt to raise a new contention by petition for rehearing, as follows:

> "McDougal asserts for the first time the contention that because Simpson was required to accept the prohibition against the export of water as a condition of obtaining the permit, any waiver of rights by him was invalid because made under duress. We have consistently refused to consider points on rehearing not previously raised in the

Court of Appeal or in this court" [citing authorities] (see Appendix "C" to the Jurisdictional Statement).

Thus, it is clear that the California Supreme Court did not expressly pass on the federal question sought to be reviewed by Appellant. Furthermore, the attempt of Appellant to interject the issue of duress was not timely or properly raised below.

Rule 16 1(b) of the Rules of the United States Supreme Court provides in relevant part as follows:

> "The court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question sought to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate nonfederal basis."

This Court has consistently refused to note probable jurisdiction of an appeal from a state court judgment resting exclusively on an adequate non-federal ground. *Johnson v. New Jersey,* 384 U.S. 719, 735 (1966); *McCoy v. Shaw,* 277 U.S. 302 (1928), see also ROBERTSON AND KIRKHAM, JURISDICTION OF THE UNITED STATES SUPREME COURT §89-103 (2d ed Wolfson and Kurland 1951); STERN AND GRESSMANN, SUPREME COURT PRACTICE (4th ed. 1969) 105-113; *The Inadequate State Ground,* 65 COL. L. REV. 943 (1965); *Henry v. Mississippi and the Adequate State Ground,* 1965 S. CT. REV. 187 (1965); Comment 61 COL. L. REV. 255 (1961), Comment, 74 HARV. L. REV. 1376; Comment 49 YALE L. REV. 1463. Civil appeals dismissed for lack of a federal question are numerous. See for example *Broad River Power Co. v. State of South*

Carolina ex rel. Daniel, 281 U.S. 537, 540-541 (1930); *Nickel v. Cole,* 256 U.S. 222, 225-226 (1921); *Leathe v. Thomas,* 207 U.S. 93, 99 (1907); *Chapman v. Goodnow's Administrator,* 123 U.S. 540, 548 (1887).

As noted, the California Supreme Court did not address the federal question which appellant sought to raise. Moreover, as the following discussion demonstrates, the Court relied on an adequate and independent ground for its decision.

II

Estoppel Is an Adequate and Independent State Ground Which Precludes Review of the California Supreme Court Decision.

As pointed out above, the substantive premise of the California Supreme Court's opinion was estoppel. The Court did not reach the alleged federal question of the relationship between the permit restriction and the commerce clause. Previous decisions of this Court clearly hold estoppel is a non-federal ground broad enough to sustain a state court decision.

The most widely cited estoppel case is *Enterprise Irrigation District v. Farmer's Mutual Canal Co.,* 243 U.S. 157 (1916). In *Enterprise,* this Court was called upon to determine relative rights of the parties to divert the waters of a river for irrigation. Discussing the Nebraska Supreme Court decision, the Court stated:

> "As has been shown, several questions were presented to the Supreme Court and all were considered. One was whether the state board's decision could be given any conclusive effect consistently with the due process and equal protection

clauses of the 14th amendment, and another was whether the defense of estoppel in pais was well founded. The first was plainly a federal question and the other was plainly non-federal . . . In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other ground and broad enough to sustain the judgment. Where this is the case, the judgment does not depend on the decision of any federal question and we have no power to disturb it . . . It is not urged, nor could it be, that, as a ground of decision, the estoppel is not broad enough to sustain the judgment . . . It results from what we have said that the judgment is one which is not open to review by this court" 243 U.S. 157, 163-166.

The *Enterprise* decision is discussed approvingly in Professor Wright's treatise. (*See* FEDERAL PRACTICE AND PROCEDURE, (Wright and Miller ed. 1977, 784); also see ROBERTSON AND KIRKHAM, JURISDICTION OF THE UNITED STATES SUPREME COURT (2d ed. Wolfson and Kurland 1951) 183-185.)

In *Pierce v. Somerset Railway*, 171 U.S. 641 (1898), the Supreme Court of Maine had been presented with the federal question of whether a state statute impaired the obligations of a contract in a mortgage, thereby violating the contract clause of the U.S. Constitution. However, the state court decided the case by upholding the defense of estoppel. This Court declined review, holding that the "question whether the defense of estoppel . . . is established is not a federal question." 171 U.S. 641, 648.

Similarly, in *Lowry v. Silver City Gold and Silver Mining Company*, 179 U.S. 196 (1900), a writ of error was dismissed because one ground of the decision "sufficient to dispose of the case" was that the lessees were estopped to contest the rights of the lessor. 179 U.S. 196, 198.

Estoppel was found to be an adequate and independent state ground in all of the following cases. *Moffet v. Commerce Trust Company*, 329 U.S. 669 (1946); *McSweeney v. Equitable Trust Co.*, 315 U.S. 785 (1941); *Twin Falls County v. Henderson*, 305 U.S. 568 (1938); *Waesche v. Thurmont Bank*, 305 U.S. 560 (1938); *Southern Nebraska Power Co. v. Nebraska ex rel. Sorenson*, 299 U.S. 520 (1936); *Bell Telephone Co. of Pennsylvania v. Van Dyke*, 296 U.S. 533 (1935); *Utley v. City of St. Petersburg*, 292 U.S. 106, 111-112 (1933); *Beals v. Cone*, 188 U.S. 184, 186 (1903); *Hale v. Lewis*, 181 U.S. 473, 479-480 (1901); *Gillis v. Stinchfield*, 159 U.S. 658, 660 (1895); *Michigan v. Flint*, 152 U.S. 363, 368 (1894); *Israel v. Arthur*, 152 U.S. 355, 362 (1894); *Sherman v. Grinnell*, 144 U.S. 198, 202 (1892); *Marrow v. Brinkley*, 129 U.S. 178, 181 (1888); *Adams Co. v. Burlington and M. River R. Co.*, 112 U.S. 123, 127-129 (1884); *Gibson v. Chouteau*, 111 U.S. 200 (1869).

Two cases in which this Court denied review of state court decisions premised on estoppel are of particular interest. *Mobile, Jackson and K.C. R. Co. v. Mississippi*, 210 U.S. 187, 204 (1907); *Rutland R. Co. v. Central Vermont R. Co.*, 159 U.S. 630, 640 (1895). Both of these appeals were dismissed even though interference with interstate commerce was alleged.

Conclusion.

The California Supreme Court decision in *County of Imperial v. McDougal* is based on the adequate, independent and tenable ground of estoppel. The opinion does not address the federal question of interference with interstate or foreign commerce. Therefore, the County of Imperial respectfully requests this Court to dismiss the appeal for failure to raise a substantial federal question. The decision below was based on an independent state ground broad enough to meet the tests of adequacy set forth in the opinions of this Court.

Dated: October 21, 1977.

Respectfully submitted,

JAMES H. HARMON,
County Counsel, County of Imperial,
Attorney for Appellee.

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-471

DONALD C. McDOUGAL,
Appellant,

v.

COUNTY OF IMPERIAL,
Appellee.

On Appeal From the Supreme Court of California

OPPOSITION TO MOTION TO DISMISS

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STATUTES

California Rule of Court #216 1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-471

DONALD C. McDOUGAL,
Appellant,

v.

COUNTY OF IMPERIAL,
Appellee.

I

THE RECORD BELOW IS CLEAR

Appellee, hereinafter referred to as "the County" asserts at page 3 of its Motion to Dismiss that the State Supreme Court has refused to hear a "new contention" on appeal. This should not be interpreted as indicative of an unclear record below.

The issue of estoppel to assert that the condition is unconstitutional was not raised by the County either in its original pleadings or in the joint pretrial statement (included as Appendix A) (Clerk's Transcript, page 310) which by California law becomes the whole pleading underlying the case. (California Rule of Court #216, *Fitzsimmons v. Jones* (1960) 179 Cal.App.2d 5). The issue was not raised at trial.

The issue was first raised on appeal to the intermediate appellate court, in Respondent's Opening Brief. The Court of Appeal, 4th District did not rule on this point, but it was nevertheless argued by Appellant, (hereinafter referred to as "McDougal") in his Response to the Amicus Curiae Brief of the State Water Resources Control Board et al., before the California Supreme Court (p. 9-10). (Set out in Appendix B)

In that brief, McDougal clearly and unequivocally asserted that estoppel could not be raised against a Constitutional challenge to a condition imposed on a grant of right.

The "new contention" of which the California Supreme Court spoke of in its denial of McDougal's Petition for Rehearing was that Simpson had accepted the condition in his permit because of "duress."

While McDougal did mention the term "duress," in a quotation from *Union Pacific Railroad v. Public Service Commission,* 248 U.S. 67 (1918), his main contention on rehearing was that the California Supreme Court had failed to distinguish between unconstitutional conditions and conditions invalid for other reasons in applying its estoppel. McDougal contended and still contends that:

1) Where a condition had been imported into a State or local permit, license or grant of right which is unconstitutional, a rule of unconstitutional conditions is applied; particularly in Commerce Clause cases and cases involving the right of the litigant to go into federal court.

2) In order to determine if there has been a waiver of these federal Constitutional rights, a body of federal law must be examined.

The body of the petition for rehearing before the California Supreme Court is included in Appendix C to this Brief.

II

THE STATE COURT DECISION IS NOT BASED ON AN ADEQUATE INDEPENDENT STATE GROUND

Appellee, the County, claims that the U. S. Supreme Court is powerless to review the case at bar because the State Supreme Court has decided, *on state estoppel grounds*, that Appellant McDougal cannot challenge the restriction in his permit as unconstitutional.

Obviously, to be an effective court of last resort, the United States Supreme Court cannot allow its hands to be tied by decisions of the state courts on what cases it should and should not review.

Where a State attaches unconstitutional conditions to a grant of right, the U. S. Supreme Court is the proper court to determine whether or not the party is estopped to challenge those conditions.

In *Davis vs. O'Hara,* 266 U.S. 314, 318 (1924), a state Supreme Court held that the Director General of the Railroads had waived governmental immunity under a federal statute. The U. S. Supreme Court stated that it was . . .

> ". . . not bound by the decision of the State Court that defendant waived his federal right under the act . . . and it may determine for itself whether he sufficiently asserted and insisted upon that right." p. 318

Rutland involved a squabble about whether a Lessee who paid an unconstitutional tax ought to be able to receive credit from his Lessor. There was no federal question of estoppel.

Despite the citation of 28 cases by the Appellee County, it has failed to produce one case in which a clearly unconstitutional condition on a grant of right was upheld using state estoppel grounds.

On the contrary, the federal courts have refused to allow state courts to enforce these unconstitutional conditions by way of estoppel. *W. W. Cargill Co. v. Minnesota,* 180 U.S. 452 468 (1901), *Pullman v. Kansas,* 216 U.S. 56, 63 (1910), *Terral v. Burke Construction,* 257 U.S. 529, 532 (1922). Also: *Surmeli v. State of New York,* 412 F.Supp. 394 (1976).

Respectfully submitted,

DONALD C. McDOUGAL, JR.
ALEX A. HARPER

APPENDICES

APPENDIX "B"

EXCERPT FROM McDOUGAL'S "RESPONSE TO THE AMICUS CURIAE BRIEF OF THE STATE WATER RESOURCES CONTROL BOARD ET AL." BEFORE THE CALIFORNIA SUPREME COURT.

In *Davis v. Wechsler,* 263 U.S. 22, 24 (1923) the U. S. Supreme Court stated:

> "We are of the opinion that the judgment must be reversed. Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice . . .
>
> "The state courts may deal with that as they think proper in local matters but they cannot treat it as defeating a plain assertion of federal right. The principal is general and necessary."

Union Pacific Railroad v. Public Service Commission, 248 U.S. 67, 69-70 (1918), involved a state court determination that the railroad could not assert any federal right to challenge a certain tax because it had applied to pay the tax, in order to continue to do business. The Court stated:

> "It is argued that a decision on this ground excludes the jurisdiction of this Court. But the later decisions show that such is not the law and that on the contrary it is the duty of this Court to examine for itself whether there is any basis in the facts, or in the evidence when the facts are in dispute, for a finding that the federal right has been waived." pp. 69-70

See also: *Garrity v. New Jersey,* 385 U.S. 493 (1967); *Creswill v. Knights of Pythias,* 225 U.S. 246 (1912); *Able State Bank v. Bryan,* 282 U.S. 765 (1931); *Sterling v. Constantin,* 287 U.S. 378, 398 (1932).

The cases cited by the County are not applicable to the case at bar.

Johnson v. New Jersey, 384 U.S. 719 (1966) (Cited at p. 4 of Appellee's Brief) did not involve estoppel, but simply upheld a state procedural rule which gave the criminal defendant a fair opportunity to raise his constitutional rights.

McCoy v. Shaw, 277 U.S. 302 (1928) upheld a state court decision that an injunction was not proper because the taxpayer had an adequate remedy at law by paying the tax and then suing for its recovery. This had nothing whatsoever to do with a state estoppel to assert a federal constitutional right.

Enterprise Irrigation District v. Farmer's Mutual Canal Co., 243 U.S. 157 (1916) at p. 5 of the County's brief, involved a weak equal protection claim by a party who had stood by while his opponent had spent vast sums in reliance on his inaction in opposing the water appropriation involved. This situation bears little relationship to the case at bar where the condition involved is clearly unconstitutional and there are no disastrous consequences possible should McDougal prevail.

The massive reliance involved would have made it inequitable to grant relief in the *Enterprise Irr. Dist.* case under either state or federal principles of estoppel.

Pierce v. Somerset Railway, 171 U.S. 641 (1896) cited at page 6 of the County's brief, involved another weak claim of federal right, this time under the impairment of contracts clause of the Constitution. Trustees of a railway had stood by and watched as others organized a plan to save the faultering

railroad. The reliance, was again, massive and estoppel lied under either state or federal law.

Lowry v. Silver City Gold and Silver Mining Company, 179 U.S. 196 (1900) cited at page 7 of the County's brief, did not even involve the assertion of a federal Constitutional right, and is thus off point.

Further cases cited by the Appellee on page 7 of its Motion to Dismiss are not helpful. The only common features presented by these cases are the facts that they all mention the word "estoppel" at least once and are all cited on the same page of Appellee's brief.

Moffett v. Commerce Trust, 329 U.S. 669 (1946), *McSweeney v. Equitable Trust Co.,* 315 U.S. 785 (1942), *Waesche v. Thurmont Bank,* 305 U.S. 560 (1938), and *Bell Telephone Co. of Penn. v. Van Dyke,* 296 U.S. 533 (1935) need little comment except to note that they are memorandum decisions upholding state court judgments where no estoppel to assert a strong federal Constitutional claim is present.

Twin Falls County v. Henderson, 305 U.S. 568 (1938) and *Southern Nebraska Power Co. v. Nebraska ex rel. Sorenson,* 299 U.S. 520 (1936) involve cases where a state was held estopped to challenge the constitutionality of a statute it had passed itself.

Utley v. Saint Petersburg, 292 U.S. 106 (1934) upheld an estoppel arising out of a landowner's failure to challenge an assessment where he had ignored a state procedure for doing so and the challenge was clearly frivilous.

Beals v. Cone, 188 U.S. 184 (1903) involved no federal right or estoppel to assert such.

Hale v. Lewis, 181 U.S. 473 (1901), *Gillis v. Steinchfield,* 159 U.S. 658 (1895), and *Sherman v. Grinnel,* 144 U.S. 198 (1892) involved frivolous Constitutional claims with tenuous relationships to the cases at hand.

Michigan v. Flint, 152 U.S. 363 (1894) held a state estopped to make a claim on land once granted by the federal government. No federal Constitutional right was asserted.

Israel v. Arthur, 152 U.S. 355 (1894) upheld a state estoppel against a wife's assertion that she should share in an inheritance from her first husband because she had remarried. No serious federal claim was asserted.

Marrow v. Brinkley, 129 U.S. 178 (1888) upheld a finding of laches against a land claimant. Again no federal Constitutional right was asserted.

Adams Co. v. Burlington and M River R. Co., 112 U.S. 123 (1884) and *Gibson v. Choutcau,* 111 U.S. 200 (1869) upheld a state court decision where no federal law was directly involved and no federal constitutional challenge was made.

The only "particular interest" associated with *Mobile, Jackson and K.C.R. Co. v. Mississippi,* 210 U.S. 187 (1907) and *Rutland Railroad v. Central Vermont Railroad Co.,* 159 U.S. 630 (1895) is why they were cited at all.

Mobile did not involve an estoppel to assert a violation of the Commerce Clause. Indeed the court ruled that the Commerce Clause was not offended. (p. 203)

APPENDIX "A"

EXCERPT FROM "JOINT PRETRIAL STATEMENT"

1. Whether the defendant's operation violates the County's zoning ordinances.

2. Whether defendant has the right to conduct the operation on the premises under the permit granted to Earle Simpson in 1967.

3. Whether defendant has a vested non-conforming right to use the premises for his operation.

4. Whether defendant's operation constitutes a public nuisance.

5. Whether the premises were governed in 1967 by the 1959 interim zoning ordinance (Ordinance 241).

6. Whether the condition inserted in the conditional use permit held by defendant and granted by plaintiff which states as follows: "The water will be sold only for use within the Imperial County" a valid and enforceable condition.

. . . Respondent's estoppel argument would have this Court reject any challenge to the unconstitutional condition here because the Appellant's predecessor in interest abided by the condition under a mistake of law.

The concept of estoppel was not meant to perpetuate unconstitutional conditions indefinitely, nor to allow state governmental bodies to accomplish under color of law unconstitutional objectives. Appellant has never acquiesced in this condition, but has maintained throughout that to abide by the condition would place him in violation of the Federal Civil Rights Act and Federal Discrimination Laws.

Edmunds v. County of Los Angeles, 40 Cal.2d 642 (1953) is not similar to the present case. In that case a *clearly valid* condition was challenged by a person who had not only accepted the benefits of the restricted permit, but also appeared to be making a superfluous challenge to an obviously valid condition. The *Edmunds* court seemed to be shocked by the clearly inconsistent position taken by the trailer park owner in that case.

In the case at bar, the appellant has consistently claimed from the first that the restriction on his permit was an illegal and unconstitutional restriction. Contrary to the *Edmonds* case, this affirmative defense to the case at bar is not superfluous. Even the Fourth District Court of Appeal recognized that this condition is clearly unconstitutional. If Appellant is estopped to challenge this unconstitutional condition, then none will be able to challenge it. It cannot be the policy of this state to allow counties to impose unconstitutional conditions under color of state law which

will be immune from later attack due to the recipient's initial mistake of law.

Appellant has repeatedly insisted that *nuisance law* is the correct way to handle this problem, rather than the more drastic method of revocation or forfeiture.

APPENDIX "C"

BODY OF PETITION FOR REHEARING BEFORE THE CALIFORNIA SUPREME COURT

L.A. 30681

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE COUNTY OF IMPERIAL, Plaintiff and Respondent, v. DONALD C. McDOUGAL, Defendant and Appellant.	L.A. 30681

PETITION FOR REHEARING AND STAY/SUPERSEDEAS PENDING REHEARING, OR PENDING RESULTS OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES SUPREME COURT

TO: THE HONORABLE CHIEF JUSTICE, and the Associate Justices of the Supreme Court of California:

DONALD C. McDOUGAL, the Appellant and Defendant in the above-entitled case, respectfully petitions this Court for a Rehearing to consider the Court's decision filed on May 25, 1977, by reversing said decision in that part which states that Petitioner, DONALD D. McDOUGAL is prohibited from selling water for use outside the County of Imperial. Petitioner's grounds for requesting this reversal are set forth below and it is on the basis of the authority cited herein, along with all papers and briefs already on file in this matter.

Petitioner further seeks a Stay and Writ of Supersedeas pending the Rehearing of this matter by the Court. Petitioner would ask that the Court Stay its judgment insofar as it prohibits Petitioner from selling water for use outside the County of Imperial, and to issue a Writ of Supersedeas allowing Petitioner to engage in International and Interstate Commerce pending the Rehearing of this matter by this Court. If this Court does not see it fit to grant Rehearing, Petitioner still requests this Stay and Writ of Supersedeas pending Petition for Writ of Certiorari to the United States Supreme Court and asks that said Stay and Writ Issue and remain in full force and effect until such time as the United States Supreme Court either accepts the Petition for Writ of Supersedeas automatically be extended until such time as the United States Supreme Court renders its decision, or if the United States Supreme Court declines to take the case on Certiorari, then at the time of the notice of the declining by the United States Supreme Court, that the Stay and Writ of Supersedeas then automatically expire.

PETITION FOR REHEARING

Petitioner (appellant) seeks a rehearing of that part of the Court's decision affirming the Court below, under Rule 27a of the Rules on Appeal, upon the grounds that there is a substantial error of law in the decision of the Supreme Court set forth in that decision.

The Supreme Court affirmed in part and reversed in part.

In that portion of the opinion in which the Court affirmed, it did so upon the express ground that one who has applied for a conditional use permit or other special permit is estopped or

otherwise waives his right to contest the invalidity of that condition. That this waiver or estoppel is binding upon his successor in interest. See the decision at pages 7 and 8.

However, the Court failed to address itself to the distinction between unconstitutional invalidity and other forms of invalidity, except to note that appellant's citation of *Shelley v. Kraemer*, (1947), 334 U.S. 1 (a case arising under the Fourteenth Amendment) was inapposite.

But, in failing to distinguish between unconstitutional conditions and other forms of invalid conditions, the Court failed to take into account a substantial body of law which has carved out this distinction both in the United States Courts and in California.

That body of law first arose because of legislative discrimination against foreign corporations, but later extended to foreign corporations or other persons whose constitutional rights were being interfered with by the attachment of unconstitutional conditions to various special permits. See 5 Witkins Summary of California Law 8th Edition, Unconstitutional Conditions, Theory and Development of Doctrine, Section 409 and Application Outside Field of Foreign Corporations, Section 410.

The doctrine seems first to have been developed in *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], where the Court held that the state could not attach to a permit, granted to a foreign corporation engaged in interstate commerce to come into the state and do business there, a condition which directly or indirectly interfered with interstate commerce and thus was repugnant to the commerce clause of the United States Constitution.

The Court rested its decision upon the ground that in all the cases in which the Court considered the subject of granting by a state to a foreign corporation consent to the transaction of business in the state, it has been uniformly held that no conditions can be imposed by the state which are repugnant to the Constitution and law of the United States. See the opinion at page 36.

The Western Union Telegraph Company had in fact applied for the permit, although it felt it was not required to do so.

In *Terral v. Burke Construction Co.* (1922) 257 U.S. 529, 42 S.Ct. 188, 66 L.Ed. 352; see generally 42 Harv. L. Rev. 676; 15 Cal. L. Rev. 316; 16 Cal. L. Rev. 228, the Court considered the very distinction between an unconstitutional invalidity and other forms of invalidity, glossed over by this Court, in which the entity had applied for and accepted the special permit, with its unconstitutional condition and thereafter the Courts sought to enforce the invalid condition.

In that case, the appellee, a foreign corporation, applied for and received a license to do business within the state upon the express condition that it give up its constitutional right to either remove a suit to the Federal Courts or file suit directly in the Federal Courts.

Having in fact both removed a state action and filed an action in Federal Court, the State was proceeding to revoke its charter.

The United States Supreme Court thereupon enunciated the following rule:

> "The principle established by the more recent decisions of this Court is that a State may not, in imposing conditions upon the privilege of a foreign corporation's doing business in the State, exact from it a waiver, of the exercise of its constitutional right to resort to the Federal Courts or thereafter withdraw the privilege of doing business because of its exercise of such right, *whether waived in advance or not.*" (Emphasis added.)

The Court made it clear that it rested its decisions upon the principle that the state in the exercise of its sovereign power is subject to the limitations of the United States Constitution, including the commerce power and the due process clause.

Thus, the United States Supreme Court put to rest the spectre of waiver of constitutional rights by holding that whether waived in advance or not, the applicant for a special permit could not thereby be deprived of his constitutional rights by including a waiver of his constitutional rights in the permit.

Viewed in this light, City of Altus, *Oklahoma, et al., v. Carr,* (1966) 255 F.Supp. 828, (affirmed by the U.S. Supreme Court without opinion at 385 U.S. 35, noted by the Court in footnote 3) as well as *Shelley v. Kraemer,* (noted by the Court in footnote 3), both become binding precedents.

In *Danskin v. San Diego Unified School District,* (1946) 28 C.2d 536, 545, 171 P. 2d 885, a statute requiring denial of the use of school buildings for meetings of subversive groups was held unconstitutional upon the authority of *Western Union Telegraph Co. v. Kansas,* 216 U.S. 1 [30 S.Ct. 190, 54 S.Ct. 355], *supra*, Terral v. Burke Construction Co. (1922) 257 U.S.

529, *supra*, the Court reasoning that the state did not have to make its school buildings available for public meetings but if it did so it could not attach to the privilege conditions depriving members of the public of their constitutional rights.

The United States Supreme Court reiterated its position that there are rights of constitutional stature whose exercise a state may not condition by the exaction of a price. That among these rights are engaging in interstate commerce, resort to the Federal Courts in diversity cases, burdening the exercise of the Twenty Fourth Amendment. *Garrity v. New Jersey* (1967) 385 U.S. 493, 87 S.Ct. 616, 620, 17 L.Ed. 2d 562, 567, *Cal. Evidence*, 2d Supp., §899A. The Court in *Garrity* (*supra*) further stated that:

> "It is said that there was a "waiver." That, however, is a federal question for us to decide. *Union Pac. R.R. Co. v. Pub. Service Comm.*, 248 U.S. 67, 60-70; *Stevens v. Marks*, 383 U.S. 234, 243-244. The Court in *Union Pac. R. R. Co. v. Pub. Service Comm., Supra*, in speaking of a certificate exacted under protest and in violation of the Commerce Clause said:
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> > 'Were it otherwise, as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than it in the case of a failure to accept it, and then to declare the acceptance voluntary . . .' Id., at 70.
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> Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other.

> 'It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.' " Ibid.

This is exactly the same case as the case presently before the Court. The County Board of Supervisors of Imperial County, along with its Planning Commission, clearly exacted from appellant's predecessors in interest's "waiver" by duress. The minutes of that meeting where exhibit "M" at trial, and also attached as Appendix "B" on Answer to Amicus Curiae Brief by the County of Imperial.[1]

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[1] The minutes state in part:

Chairman Kilgore called the meeting to order and advised those present that the Board of Supervisors and the Planning Commission are meeting in joint session to discuss various items of concern to both.

Chairman Kilgore directed Mr. T.J. Sands, Attorney for Mr. W. Erle Simpson, to come forward and state his reasoning for a zoning permit being granted to include water exportation to Mexico. He further stated that since the Board and Commission are now meeting to reach a decision in regards to a Water Exportation Policy, that this is the best time to hear the application.

Mr. Sands, Attorney for Mr. Simpson, stated that his client has gone over the permit application with him, and has agreed to remove the portions stating or indicating any sale of water to Mexico; however, he requested that the application be approved to allow the sale of certain portion of water to Mexico up to 12-31-68, at which time it would cease. He further stated that the amount sold to Mexico would only be equal to the amount now being sold to Mexico by other persons who own wells in the area. He also stated that approximately 9 trucks per day are exporting water to Mexico, and that his client's exportation would certainly not exceed that. . . .

Of course in any event *Terral* (*supra*) settles the question of the waiver of their basic constitutional rights, such rights arising under the Commerce Clause, that states cannot exact a "waiver" of such constitutional rights, whether waived in advance or not.

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cont. [1]Chairman Kilgore stated that exactly 21 trucks per day during a seven day period go into Mexico. He further stated that none of the current operations have submitted application to this Board of Supervisors for approval of exporting water into Mexico, and, if granted, were prior to this Board of Supervisors.

Discussion was held on just what the County could do to restrict or prohibit the exportation of water.

John Pattie, Deputy County Counsel, stated that after considerable research, the findings of the County Counsel is that there is no conflict with the Federal Constitution as far as Interstate or International Commerce is concerned, as to how the local agencies control their natural resources.

Supervisor Langley, stated that in short, we have the right to set our own policy. . . .

Mr. Sands questioned if he would be in favor of a limited period of time, as previously requested, up to 12-31-68.

Chairman Kilgore stated that his main purpose in referring the permit application to the Board of Supervisors was to determine a Policy, because of his concern over the amount of water being taken out of this area.

Mr. Sands questioned if the planning Commission would be opposed to any sale of water to occupants of the Valley.

Commissioner Bornt stated that he was not, and had never indicated such, nor had the members of the Boards, their main concern was the amount of water being exported out of our County....

Supervisor Langley stated that if at all possible, the *exportation of water into Mexico, should be stopped. . . .*

Chairman Kilgore directed Mr. Sands to resubmit the zoning application to the Planning Commission with the understanding of knowing the Board's purpose and intention of adopting, in conjunction with the Planning Commission, a definite Water Exportation Ordinance.

Commissioner Bornt stated that the permit could be granted this morning when the Planning Commission meets, under the Interim Zoning Ordinance, subject to the restriction of the water being sold only within the County of Imperial." [Emphasis added]

It is clear, therefore, that the reliance of this Court upon the cases involving estoppel to assert the invalidity of the conditions imposed a special permit by accepting that permit is misplaced where the invalidity, as here, is its repugnance to the Commerce Clause of the United States Constitution.

PETITION FOR STAY AND WRIT OF SUPERSEDEAS

Petitioner and Appellant, DONALD C. McDOUGAL, hereby petitions this Court for a Stay of its Order entered on May 25, 1977, which states that Petitioner Appellant is prohibited from selling water for use outside the County of Imperial. Petitioner only asks that the part of the Court decision be stayed and that the balance of the Court's decision which reverses the findings of lower Court remain affirmed and become final.

Along with the Stay of the Court's findings, the Petitioner also asks that this Court issue a Writ of Supersedeas ordering that Petitioner be allowed to engage in Interstate Commerce and International Commerce from his well pending the rehearing by this Court of this matter. The grounds for this Writ are contained in the Petition for Rehearing above. Should this Court not see fit to rehear this case, Petitioner still asks that the Stay and Writ of Supersedeas issue from this Court and that this Stay and Writ of Supersedeas be effective until such time as the United States Supreme Court has ruled on Petitioner's Petition for Writ of Certiorari. Should the United States Supreme Court see fit to grant Certiorari, Peitioner requests that the Stay and Writ of Supersedeas

remain in full force and affect until such time as the United States Supreme Court enters a decision in this case.

Respectfully submitted,

s/s
DONALD C. McDOUGAL, JR.

s/s
ALEX A. HARPER

Attorneys for Defendant and Appellant